



POLICE DEPARTMENT

December 12, 2019

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In the Matter of the Charges and Specifications : Case No.
- against - : 2018-18847
Sergeant Edwin Soto :
Tax Registry No. 935778 :
Transit Borough Manhattan Task Force :
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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Jeannie Elie, Esq.
Ifeamaka Igbokwe, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Matthew Schieffer, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road – Suite 220
White Plains, NY 10603

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Sergeant Edwin Soto, on or about October 14, 2017, at approximately 1754 hours, while assigned to TB M/TF and on duty, at the 42nd Street subway station (near the West 44th and 8th Avenue entrance), New York County, abused his authority as a member of the New York City Police Department, in that he interfered with A's use of a recording device by blocking the camera lens of his cellphone without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

2. Sergeant Edwin Soto, on or about October 14, 2017, at approximately 1754 hours, while assigned to TB M/TF and on duty, at the 42nd Street subway station (near the West 44th and 8th Avenue entrance), New York County, was discourteous, in that he stated to not "fucking record" to A without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT - GENERAL

3. Sergeant Edwin Soto, on or about October 14, 2017, at approximately 1754 hours, while assigned to TB M/TF and on duty at the 42nd Street subway station (near the West 44th and 8th Avenue entrance), New York County, abused his authority as a member of the New York City Police Department, in that he threatened to arrest A without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT

4. Sergeant Edwin Soto, on or about October 14, 2017, at approximately 1754 hours, while assigned to TB M/TF and on duty, at the 42nd Street subway station (near the West 44th and 8th Avenue entrance), New York County, wrongfully used force, in that he pushed A against the wall and held him there without police necessity.

P.G. 221-02, Page 2, Prohibition 11 USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 20 and September 27, 2019. Respondent, through his counsel, entered pleas of Not Guilty to the subject charges. CCRB called Erin Amlicke. Respondent called Sergeant Paul Grattan and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Based upon the credible, relevant evidence in the record, I find Respondent Not Guilty of Specifications 1, 3 and 4. I further find Respondent Guilty of Specification 2 and recommend that he forfeit three vacation days.

SUMMARY OF EVIDENCE

The following is a summary of the undisputed evidence. On October 14, 2017, shortly before 1800 hours, A and other unrelated individuals were stopped by plainclothes police officers at the 42nd Street subway station for fare evasion. Due to Department practice for such situations, the individuals were taken into custody, but not placed in handcuffs, while directed to stand outside the transit police command. Another individual was brought over in handcuffs and A attempted to film the man's interaction with an officer, believing he had the right to do so. Respondent emerged from the command and simultaneously blocked A from filming, while warning him to stop. At issue is whether Respondent pushed A, threatened to arrest him, used discourteous language towards him, and prevented him from filming, all without legal authority.

CCRB Exhibit 1 is the security camera footage from outside the command.¹ A² can be seen walking to the command, wearing a baseball cap, a jacket and shorts, escorted by Police Officer Miracco³ in plainclothes. Shortly thereafter, a plainclothes male officer brings two more individuals to the command. A periodically glances at his phone, which is held parallel to the floor, suggesting that he is not filming his surroundings at that time. Uniformed and plainclothes officers stand by and walk back and forth (CCRB Ex. 1:07:13-12:17).

¹ There is no audio portion to the recording.

² Respondent identified the arrestee as A when shown the video (T. 60).

³ Respondent identified the MOS as Police Officer Miracco when shown the video (T. 65).

A man in a sleeveless shirt is brought over to the command in handcuffs by Sergeant Lagatola,⁴ in uniform, and a plainclothes officer. Erin Amlicke,⁵ wearing a black dress, walks near the command, and pauses to watch. Almost simultaneously, Sergeant Lagatola returns from the command to the man and appears to admonish him, and the plainclothes officer searches his pockets. Respondent and Officer Strong⁶ emerge and watch (*Id.* 12:17-14:33).

A begins recording; Respondent notices and then starts pointing at A and speaking to him. He appears to grab the phone, as well as A's hand, and touches A's chest. After Respondent releases A's hand, A appears to turn away and shelter the phone near his chest, at which point Respondent and Strong push him against the wall. Eventually, A puts his phone away. A and Respondent appear to argue, with both gesticulating at various points. A does not remove his phone from his pocket again after this discussion. Amlicke is standing to the side, watching intently throughout. Miracco gives A a summons and A leaves while pointing at Respondent and appearing to shout. Amlicke walks after A (*Id.* 14:33-16:05).

CCRB Exhibit 2 is the cellphone video recorded by A. It is only two seconds long and the camera is jostled throughout. It concludes with what appears to be a hand covering the camera (CCRB Ex. 2: 0:00 0:02).

The following is a summary of the relevant evidence at trial.

CCRB Exhibit 3B is a transcript of an interview between CCRB Investigator Judith Le and A. Although a hearsay statement, it has some probative value regarding A's motivations and conduct during the incident. A stated that on October 14, 2017, at approximately 1810 hours, he entered the subway station at the corner of 44th Street and Eighth

⁴ Respondent identified the MOS as Sergeant Lagatola when shown the video (T. 73).

⁵ Amlicke identified herself when shown the video (T. 35).

⁶ Respondent identified the MOS as Police Officer Strong when shown the video (T. 65).

Avenue. The MetroCard reader was not working and A "admittedly" did not want to go to a different booth to pay, so along with other individuals he evaded the fare. He was stopped "pretty much immediately by [a] plain clothes police officer." He was brought to what he assumed was the transit police command center. He saw another person who had been "asked to wait" but was being "berated" in "a very unprofessional interaction by the police officer." The man seemed "confused" and "potentially frightened" so A decided to record the interaction. A had had his phone in his hand for approximately 15 seconds and had just hit the record button when another individual (Respondent), without identifying himself, told A that he could not record and grabbed his phone, covering it with his hand. A thought he heard Respondent say, "Don't fucking record." A eventually learned that this individual was Respondent. A said that he had the right to record and Respondent "flashed his handcuffs" and told him to stop recording "or else, essentially." Respondent spun A around and held him up against the wall. A asked repeatedly whether he was being arrested and was told that he was not. Another officer, who was acting "somewhat" more professionally gave him a summons, at which point A asked Respondent for his name, which he provided; A then left. He denied saying anything upon leaving. He acknowledged that he was not injured and his phone was not damaged (Ex. 3B; T. 3-6, 15-18, 21-22, 27).

Erin Amlicke testified that on October 14, 2017 at approximately 1754 hours, she was at the 42nd Street subway station, wearing a black dress and carrying a backpack. She saw a man in handcuffs, who looked upset, being arrested by a police officer. They were standing "right next to the police station." There was also a police officer in plainclothes holding the man's handcuffed hands. Amlicke also observed an Asian couple "in their teens or early 20s" and "a man in a baseball cap and backpack (A)," who was using his phone. More officers emerged from the "station," including Respondent, who was wearing a black t-shirt and jeans.

He was approximately four feet from the man in the baseball cap but separated by a metal barricade, and further from the man and Asian couple. Amlicke began paying closer attention to Respondent when she saw him “reach out to block the video” that A was recording with his phone. After reaching toward the phone, Respondent told A, “You don’t want to do that. Stop doing that” (T. 13-20).

Amlicke then saw Respondent move quickly around the barricade to the man with the phone and continue telling him to stop. Respondent then “became more aggressive,” and said, “Stop fucking doing that. You don’t want to fucking do that.” According to Amlicke, Respondent “constantly” used the word “fucking.” Every time Respondent tried to take his phone away, A would try to continue recording by moving the phone away and backing up. Eventually, Respondent “pushed him up against the wall and took out...handcuffs.” Respondent told A, “I’m going to fucking arrest you if you don’t stop doing this,” while showing him the handcuffs. A started to say, “I know my rights” repeatedly, and Amlicke “moved in very quickly” because A looked upset. She told Respondent, “Stop; you’re hurting him.” Respondent continued pushing A against the wall with his forearm, at which point a female officer came to help Respondent (T. 20-27, 40).

According to Amlicke, Respondent started to release A, who again began to try to film, before Respondent “threw him more roughly up against the wall.” A was then hunched over, with both Respondent and the female officer pressed up against him, at which point he “very quickly tried to raise his hands” and said that he would stop. A began standing back up and Respondent appeared to tell him in a quieter voice why he could not use his phone. A female officer in plainclothes (Miracco) emerged from the “police station” and handed A a yellow slip of paper. A asked Respondent his name before leaving, and

Respondent answered, "My name is Sergeant Soto." Amlicke tried to follow the man to ask if he was alright, but was unable to reach him (T. 28-32).

When shown the video of the incident at trial, Amlicke was able to identify herself, the man using his phone (A), the man in handcuffs, the female officer, the Asian couple, and Respondent. She also identified the moments when A had his phone in his hand and when Respondent tried to push him against the wall (T. 34-37, 40-41).

Amlicke admitted that she was unaware during the incident whether A (or the Asian couple) had had any prior contact with the police in their official capacity moments earlier. She also did not know why the man was in handcuffs. She further acknowledged that at one point, A, with his back to Respondent, held his phone by his stomach. She admitted that while she thought Respondent told A he would arrest him, it was possible that he instead said, "Don't make me put these on you" (T. 45-49, 54).

Sergeant Paul Grattan testified that he has been working at Transit Bureau Headquarters in the Office of the Chief of Transit since 2012, where he helps the Transit Bureau to, *inter alia*, review and draft internal policy, create training documents, and release information to the press. He stated that the theft of services policy "changes from time to time," sometimes due to changes in the law itself. He also conducts training on Patrol Guide procedures for police officers in the Transit Bureau. He testified that it is "not unusual" for the topic of fare evasion to constitute one to two hours of the training (T. 123-136).

According to Sergeant Grattan, the policy for arresting an individual for theft of services under Patrol Guide § 209-39 "outlines that when an officer observes somebody evade a fare, in other words, commit theft of services, a penal misdemeanor, they take the individual into custody." He added that the individual would "not necessarily" be handcuffed, but that the officer should indicate that the individual is not free to leave. Additionally, officers are expected

to maintain a tactically sound environment, which can be accomplished by handcuffing the individual, simply "not allowing them to have something in their hands," or having the person sit. A person who is in custody "would not be allowed to go into their pockets" and would be expected to remain still. In such a situation, an individual should not be allowed to use his phone, as this would disrupt the tactically sound environment, regardless of whether the arrestee is in handcuffs. When a person is arrested for theft of services, Transit officers will request their identification to determine whether simply to issue a summons. The "overwhelming majority" of such offenders receive the summons and are allowed to leave, but some do not qualify for the summons, for example if they have a warrant for their arrest or are sought in an investigation. In the latter case, the individual would instead be taken into custody and "removed to a Department facility" (T. 140-145, 154, 162-165, 170-174).

Sergeant Grattan denied that officers always use verbal commands before physically restraining arrestees for fare evasion. He testified that officers have discretion in handling an arrestee's attempted use of a cell phone; they "are not trained to give a verbal command before the use of force in all circumstance[s]." Verbal commands should be used when possible but officers can sometimes "move directly towards a use of force." He admitted, however, that while a person is waiting to receive a summons or be taken into a police facility, and is holding his phone, it would probably be "most appropriate" to give the person an instruction before moving to physical force. He also acknowledged that he could not cite a Patrol Guide section dealing with civilians using their phones while waiting for a summons and added later that "the gist of the policy" is that it is permissible for members of the public, such as bystanders or witnesses who are not in custody, to record police interactions (T. 146-156, 169).

Respondent testified that on October 14, 2017, at 1754 hours, he was working inside the command inside the 42nd Street subway station. There were several individuals detained outside

the command for theft of services. Police Officer Miracco entered and said that she was running someone's name in the database, to see whether he would be eligible for a summons or whether he had a warrant. Respondent heard a commotion and came outside, where he saw the man in handcuffs and the man with the phone, A was saying that "the cops were unlawfully arresting that man," which caused bystanders to look in that direction. Respondent "saw him take out his cell phone trying to record what was going on with the first person that was placed under arrest." Respondent told him that he was not allowed to record, took out his handcuffs, and told him that he would handcuff him if he did not stop. Respondent had been trained that, for safety purposes, he should be able to see an arrestee's hands and that any item could potentially be a weapon. A continued trying to film.

Respondent testified, "At some point in the video you can see when I try to grab the phone from his hands, he pushes me a little bit and that's when we gravitate towards the wall because of the defense he was putting against me and then when he finally starts to lean over the railing, he complied." Respondent added that he had authority to handcuff A but decided to give him the courtesy of seeing whether he was eligible for the summons, which he ultimately received. Once A received the summons, he asked Respondent for his name, which Respondent provided, and A then told Respondent that he would make him lose his "fucking job" because he worked for City Hall. Respondent could not recall whether any other MOS had attempted to stop A from filming prior to his intervention, or how much time had elapsed between his verbal commands and using force (T. 57-62, 83-88, 94, 98-100).

Respondent viewed the video and identified the time when he was observing what was happening outside the command. Officer Miracco had told him that she was checking whether one person was eligible for a summons. Respondent also identified the point at which A was under arrest and "started to intervene with the other arrest that was going on to the left."

Respondent tried explaining "the safety parameters" to A, and why he could not record. Respondent testified that he "believed" he was holding his handcuffs. Respondent tried to grab A's phone because he would not put his phone away, and A turned his back toward him while pressing his phone against his chest. Officer Strong was next to Respondent and put her hands on A. Finally, A put his phone back in his pocket (T. 62-65).

Once A put his phone away, Respondent was able to explain to him why he could not have anything in his hands, for his and Respondent's safety. Respondent explained that "sometimes cell phones can be used as a weapon." Respondent identified that in the video, "you can see him nod his head up and down; he told me he agreed, he understood the reason why I told him he couldn't have the phone." Officer Miracco handed A the summons and Respondent decided not to handcuff A, even though he had the authority to do so, in order to give him "the benefit of the doubt." Respondent testified that "the video shows I showed great restrain[t] and I allowed Officer Miracco to still issue a summons" despite A's failure to cooperate. Respondent maintained that he could have added charges of disorderly conduct and resisting arrest because A caused "public alarm" and "commotion," but instead he showed restraint (T. 65-67, 95-96).

1. Interference with Use of a Recording Device

Specification 1 charges Respondent with blocking A's phone from recording, without legal authority. Patrol Guide procedure 203-29, issued after the incident in question, reminds officers again of the public's right to record police activity:

Individuals have a right to lawfully observe and/or record police activity including, but not limited to detentions, searches, arrests or uses of force. This right extends to individuals in public places, such as streets, sidewalks, and parks, as well as private property in which the individual has a legal right to be present, such as buildings, lobbies, workplaces or an individual's own property. This right to observe and/or record police action can be limited for reasons such as the safety of officers or other members of the

public, or when a violation of law is committed by the individual(s) who are observing/videotaping.

(P.G. 203 29).

It is not in dispute that citizens are generally allowed to record police in public, including police conduct toward other individuals, such as the man in handcuffs, whom A was recording. In this case, however, A was under arrest at the time he was making the recording. In most situations, an arrestee such as A would be in handcuffs and, as a practical matter, unable to hold his phone, let alone record a video. Although arrestees for theft of services are not typically handcuffed, this does not grant them an exception to the rule laid out by Sergeant Grattan that they are not to hold objects in their hands. While A had apparently used his phone for a period of time prior to Respondent stepping into the detention area, once a commotion had commenced, it was reasonable for Respondent to have a heightened awareness of, and desire for, compliance with the rule and, for security reasons, remove an object from an arrestee's hand after he refused to do so voluntarily.

I credit Sergeant Grattan's testimony that MOS are trained to prevent arrestees from holding items in their hands, in order to maintain a tactically sound environment. As Patrol Guide § 203-29 states, the right of members of the public to record police action "can be limited for reasons such as the safety of officers or other members of the public, or when a violation of law is committed by the individual(s) who are observing/videotaping." Both factors were present here: A had committed a violation of the law and was arrested, and was ordered to put away the phone for safety reasons, as articulated by Sergeant Grattan. Therefore, I find Respondent Not Guilty of Specification 1.

2. Discourtesy

Specification 2 charges Respondent with using discourteous language. Respondent and his counsel did not persuasively dispute this allegation, and I credit Amlick's testimony that she heard repeated profanity. Consequently, I find Respondent Guilty of Specification 2.

3. Threatening to Arrest Without Legal Authority

Specification 3 charges Respondent with abusing his authority by threatening to arrest A without legal authority. It is undisputed that Respondent took out his handcuffs at one point. However, it is unlikely that Respondent actually said that he would arrest A himself told investigators that Respondent "never said he was going to arrest me per se, but he said – he basically said, 'Stop.'" Furthermore, as a legal matter, A actually was under arrest; thus, Respondent had the right to handcuff him or mention arresting him as a consequence for his lack of cooperation. From the start, Respondent and his colleagues had the legal authority to place A in handcuffs and simply elected not to do so as a courtesy, in line with Department practice. Respondent did not abuse his authority by displaying his handcuffs. Therefore, I find Respondent Not Guilty of Specification 3.

4. Using Force Without Police Necessity

Specification 4 charges Respondent with pushing A against the wall and holding him there without legal authority. As a general rule, Members of Service "[a]pply no more than the reasonable force necessary to gain control" (P.G. 221-01, 221-02[11]). In determining whether the use of force is reasonable, members of the service should consider:

- a. The nature and severity of the crime/circumstances
- b. Actions taken by the subject
- c. Duration of the action
- d. Immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders
- e. Whether the subject is actively resisting custody
- f. Whether the subject is attempting to evade arrest by flight

- g. Number of subjects in comparison to the number of MOS
- h. Size, age, and condition of the subject in comparison to the MOS
- i. Subject's violent history, if known
- j. Presence of hostile crowd or agitators
- k. Subject apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence.

(P.G. 221-01).

In this case, A was under arrest and not free to leave. He incorrectly believed that he had a right to film the police action, because he was unaware of the limitations imposed on those arrested, even if not handcuffed. As a consequence, he refused to put his phone away when Respondent ordered him to do so and twisted his body to shield his phone when Respondent attempted to seize it.

Patrol Guide procedure 221-02 defines "active resisting" as including:

"physically evasive movements to defeat a member of the service's attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody."

(P.G. 221-02).

As discussed above in the analysis under Specification 1, Respondent stepped out of his office because he heard what appeared to be a commotion. There were at least four civilians under police control in the immediate area, in addition to numerous users of the subway system. Under these circumstances, it was reasonable for Respondent to have a heightened concern for physical security. Given that A was in custody, it was not unlawful for Respondent to prevent him from holding any object, such as a phone, in such a scenario, even if he had been using it undeterred moments before. Whether or not other police officers observed A holding his phone and elected not to address it as a security concern is irrelevant to the reasonableness of Respondent's decision to address A holding the phone under the circumstances he perceived when he exited the office. I find that in pushing A against the

wall, and holding him there until he pocketed his phone, Respondent used limited force calculated to gain compliance from A. Accordingly, I find Respondent Not Guilty of Specification 4.

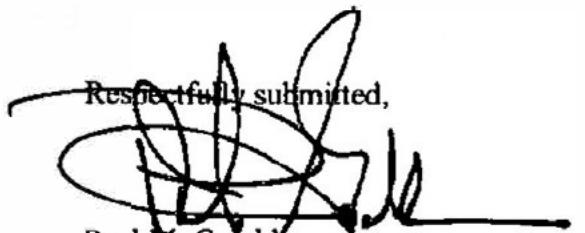
PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

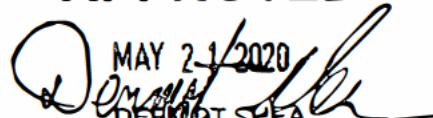
Counsel for CCRB has recommended that Respondent forfeit at least 12 vacation days. Inasmuch as I have found him Not Guilty of Specifications 1, 3 and 4, that recommendation is excessive.

Respondents have received or negotiated penalties of no more than two days in recent cases of courtesy toward a civilian (*Disciplinary Case No. 2014-11867* [May 25, 2016])[Sixteen-year police officer with one prior adjudication negotiated with CCRB a penalty of two vacation days for (i) acting courteously toward an individual in that he picked up the individual's backpack and threw it from the vestibule of a store outside the building, (ii) threatening an individual with the use of force, and (iii) speaking courteously to an individual in that he stated, "You're a dickhead. You're a dickhead"]]; *Disciplinary Case No. 2014-11998* [October 14, 2015][Ten-year lieutenant with no prior disciplinary record forfeited one vacation day for courteously telling complainant in an aggressive manner, "Who are you, who are you? Take your phone. Get out of here"]]; *Disciplinary Case No. 2014-12034* [March 2, 2016] (Thirty-year police officer with no prior formal disciplinary history negotiated with CCRB and received reinstruction for (i) being courteous to an individual, and (ii) threatening an individual with the use of force]).

While I take note of the precedent, the circumstances of this case warrant a more severe penalty. In this case, Respondent repeatedly used the word "fucking" while interacting with an arrestee. While it is true that Respondent was in the midst of gaining compliance from a non-cooperative individual when he used the profanity in question, the use of this language runs counter to the Department's values to render our services with courtesy and civility. As a supervisor, Respondent should have behaved more professionally and avoided using profanity towards A, who it seems was genuinely unaware that he was under arrest at the time. Finally, the unjustified use of such language, in a busy subway station, in combination with the relatively minor nature of A's offense, erodes public confidence. In light of these factors, I recommend that Respondent forfeit three vacation days.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED


MAY 21/2020
DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT EDWIN SOTO
TAX REGISTRY NO. 935778
DISCIPLINARY CASE NO. 2018-18847

Respondent was appointed to the Department on July 1, 2004. On his last three annual performance evaluations, he received a 5.0 overall rating of "Extremely Competent" for 2018 and 4.5 overall ratings of "Extremely Competent/Highly Competent" for 2016 and 2017. [REDACTED]

[REDACTED] He has received 11 medals for Excellent Police Duty.

Respondent has no formal disciplinary history.

For your consideration.

A handwritten signature in black ink, appearing to read "Paul M. Gamble".

Paul M. Gamble
Assistant Deputy Commissioner Trials